Proposed Hearing Officer Report as Required by 10 S.C. Code Ann. Regs. 103-839(B)
Regarding Prehearing Conference in Docket No. 2017-281-E

Summary of Complaint Allegation and Answer

On August 31, 2017, Shorthorn Solar, LLC et al. ("Complainants" or "Solar Developers") filed a Complaint against Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively "Respondents" or "Duke" or the "Companies") stating that Duke has refused to enter long-term power purchase agreements ("PPA") and instead only offered PPAs with a duration of five years. Complainants allege that a five year duration is not long enough to provide a reasonable opportunity for the Solar Developers' projects to attract financing as required by the Public Utility Regulatory Policy Act ("PURPA"). Complaint at 2.

Duke answered the Complaint stating that the Companies offered to purchase Solar Developers' output at rates based on fixed, forecasted avoided capacity and energy costs over a five year term, which is an appropriate length of time that balances the goals of PURPA while protecting the Companies' customers from the risk of overpayment associated with longer contract terms. Answer at 1.

Prehearing Conference in Lieu of Procedural Hearing on Discovery

After agreement of the parties, as memorialized by Hearing Officer Order No. 2017-72-H, counsel for the parties convened at the offices of the Commission on November 15, 2017 to work through issues raised by the Motion to Compel Discovery Responses filed by Respondent Duke. Complainants, who represent a majority of the utility scale solar developers in South Carolina, have not responded to Duke's discovery requests. Those in attendance were Hearing Officer Josh Minges, Esq., as well as counsel for complainants, Richard Whitt, Esq. and Ben Snowden Esq., counsel for Duke, Frank Ellerbe, III, Esq. and Rebecca Dulin, Esq., and counsel for the Office of

Regulatory, Staff Andrew Bateman, Esq. Ultimately, a procedural hearing was unnecessary because the parties were able to discuss the matter and agree both to cooperate on discovery and work toward a resolution of the Complaint.

With this view toward cooperation, counsel for the parties had a productive exchange regarding the law surrounding the issues raised by the Complaint and also had a good general conversation regarding discovery. Below is a summary of the law that was discussed at the meeting along with a synopsis of how the conference was concluded. Some detail has been added to the summary of the legal discussion for ease of understanding.

Overview of Legal Issues Discussed

Under Section 210 of PURPA, 16 U.S.C. § 824a-3, and 18 C.F.R. § 292.303, electric utilities are under an obligation to purchase energy from qualifying facilities ("QF"), such as Complainants. The regulations implementing PURPA set a utility's avoided cost as the cap for the rate of those energy purchases and further explain that the rate must be just and reasonable to the utility's electric consumer, must be in the public interest, and must not discriminate against QFs. 18 C.F.R. § 292.304(a). This balancing of interests suggests that electric utilities and qualifying facilities must bargain over the ultimate purchase rate, which is additionally clarified by the requirement that the duration of the contract between the parties is one of the negotiated factors in the rate for purchase. 18 C.F.R. § 292.304(e)(2)(iii).

Since duration of the contract is a variable in setting the avoided cost rate, this factor is a necessary element that must be addressed when a utility and qualifying facilities are determining the terms of power purchase agreements. The Federal Energy Regulatory Commission ("FERC") has reviewed the issue of the length of these agreements and stated:

> …[FERC] has long held that its regulations pertaining to legally enforceable obligations "are intended to reconcile the requirement that the rates for purchases

> equal to the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments, by necessity, on estimates of future avoided costs" and has explicitly agreed with previous commenters that "stressed the need for certainty with regard to return on investment in new technologies."[11] *Given this "need for certainty with regard to return on investment," coupled with Congress' directive that the Commission "encourage" QFs,*[12] *a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors.*[13]

Windham Solar LLC & Allco Fin. Ltd., 157 FERC ¶ 61,134 (internal cites omitted)(emphasis added).[1] In considering FERC's instruction to utilities requiring that agreements "be long enough to allow QFs reasonable opportunities to attract capital from potential investors" with the provision of 18 C.F.R. § 292.304(a) that the rate must be just and reasonable to the utility's electric consumers, *Windham* indicates these elements are essential, negotiated terms best tailor fit between the parties under the utility's obligation to buy a QF's power.

A similar matter was considered in *In Re: Pacolet River Power Company, Inc. v. Duke Power Company*, Docket No. 95-1202-E, where the Commission exercised its discretion to impose the duration of the contract. In that Docket, Pacolet alleged Duke should have entered into a contract with a duration of fifteen years. Duke maintained the power purchase agreement must be five years. The Commission originally decreed that ten years was an appropriate term for the contract, but later adjusted the term to seven and one half years based on its broad authority to modify electric utility contracts. Order No. 96-479 (August 1, 1996) at 5.

In its reasoning, the Commission found that "PURPA does not specify a minimum or maximum length of time under which energy or capacity payments should be fixed… and this Commission has discretion in implementing PURPA and the FERC rules regarding contract terms

[1] Although this passage from *Windham* refers to legally enforceable obligations, the reference relies on 18 C.F.R. § 292.304(d), which includes other contractual obligations in the context of a utility's requirement to purchase from qualifying facilities. Therefore, it is reasonable to interpret *Windham* as referring to power purchase agreements generally.

and rates." *Id* at 4. On remand for mostly other reasons, the Commission further explained that negotiation between the parties was encouraged for long-term agreements and noted that guidance for establishing PURPA contracts with long-term considerations was provided by the utility's planning horizon. *See* Order No. 2001-663 (July 24, 2001) at 7. The maximum planning forecast of loads and resources was suggested as a key consideration in determining the length of the agreement, and it was stated that the minimum time horizon should not be less than the lead time for baseload generation, although other factors could set the length. *See Id.*[2]

Currently, DEP and DEC are limiting the duration of their PPAs to the five year short-term planning horizon, rather than the long-term horizon of fifteen years. Complainants' proposed solar generation projects, without including the addition of the parties in Docket No. 2017-321-E,[3] amount to 1,150 megawatts ("MW") out of 2,810 MWs of proposed solar development in the Companies' interconnection queues. Answer at 2, 6. As of June 1, 2017, DEC has no utility scale solar installed to meet its goals under Act 236.[4] Martin PF Direct Testimony at 3, Docket No. 2017-3-E. DEP equally seems to have no utility scale solar installed but anticipates that 13 MW should be energized by the end of 2018. Brown PF Direct Testimony at 12, Docket No. 2017-1-E. With these levels of utility scale solar currently deployed, given the goals of Act 236, it appears that there is room for Duke to cooperate and negotiate with the Solar Developers over a fair duration to the PPAs that both allows Solar Developers a reasonable opportunity to attract capital and still accommodates Duke's concern regarding overpayment associated with longer contracts.

[2] Ultimately, the Seven and one half year decision as the term for the power purchase agreement was overturned for other reasons. Order No. 2001-663 at 12-13.

[3] Docket No. 2017-321-E was consolidated into the present Docket by Order No. 2017-703 (November 8, 2017).

[4] Order No. 2015-194 (March 20, 2015), Order Exhibit 1 at 3-4, in Docket No. 2014-246-E.

Outcome of Discussion Regarding Discovery

Since the Commission allows for broad discovery under 10 S.C. Code Ann. Regs. 103-833, the parties agreed that it was in the best interest of everyone to cooperate as fully as possible. The parties also agreed that if a problem arose, the guidance of Judge Anderson's decision attached to the Motion to Compel would be followed such that Complainants would respond to discovery requests with the best of their ability and describe any harm for not responding with particularity. The parties additionally agreed that objections to individual discovery requests should be filed in the Docket and ruled on by the Hearing Officer.

Last, settlements are encouraged before the Commission, and it was the opinion of the parties that a tailored agreement that was worked out between Duke and the Solar Developers would be preferable to what the Commission imposed in *Pacolet* mentioned above. To this end, the meeting concluded with everyone understanding that Solar Developers' participation in discovery to the fullest extent possible would allow Duke to understand the nature of the financing problem at the heart of the Complaint and allow for better cooperation toward settling the issue.